

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

JOHNNY MOORE,
Petitioner,

Case No. 1:11-cv-155

vs.

Bertelsman, J.
Litkovitz, M.J.

WARDEN, LONDON
CORRECTIONAL INSTITUTION,
Respondent.

**REPORT AND
RECOMMENDATION**

Petitioner, an inmate in state custody at the London Correctional Institution in London, Ohio, has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on petitioner's motion to amend the petition filed on June 17, 2011. (Doc. 17). Also pending before the Court for ruling is petitioner's motion for evidentiary hearing (Doc. 22), which is opposed by respondent. (*See* Doc. 23).

In his motion to amend, petitioner seeks permission to amend the petition to add more claims for relief. (Doc. 17). However, in the motion, petitioner does not identify the additional grounds to be included in the petition. Instead, petitioner subsequently filed another motion to amend on August 9, 2011 specifying eight additional grounds for relief to be included in the petition. (*See* Doc. 18). The subsequently-filed motion has been granted in a separate Order issued this date. Therefore, petitioner's motion to amend filed on June 27, 2011 (Doc. 17) should be **DENIED** as moot.

Petitioner has also filed a motion generally requesting an evidentiary hearing in this matter. (Doc. 22). Respondent opposes the motion. (Doc. 23). The undersigned **RECOMMENDS** that petitioner's motion for evidentiary hearing (Doc. 22) be **DENIED**.

As an initial matter, to the extent petitioner requests a hearing on issues that were adjudicated by the state courts, this Court is not permitted to consider evidence outside the state-court record in assessing, under the applicable standard of review set forth in 28 U.S.C. § 2254(d), whether the state courts' rulings were contrary to or involved an unreasonable application of clearly-established Supreme Court precedents, or were based on an unreasonable determination of the facts. *See Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011); *see also Robinson v. Howes*, 663 F.3d 819, 823 (6th Cir. 2011); *Sheppard v. Bagley*, 657 F.3d 338, 343-44 (6th Cir. 2011); *Keeling v. Warden, Lebanon Corr. Inst.*, __ F. App'x __, No. 09-4284, slip op. at 21, 2012 WL __, at *__ (6th Cir. Feb. 14, 2012). Cf. *Barton v. Warden, Southern Ohio Corr. Facility*, No. 1:09cv353, 2011 WL 2293225, at *4-5 (S.D. Ohio June 8, 2011) (Merz, M.J.) (vacating order granting an evidentiary hearing in a § 2254 habeas case in light of *Pinholster*).

Moreover, to the extent petitioner requests an evidentiary hearing on claims for relief that were not adjudicated on the merits and were not factually developed in the underlying state-court proceedings, he has not demonstrated that an evidentiary hearing is warranted in this case. In order to obtain an evidentiary hearing in such circumstances, petitioner must demonstrate that (1) "he attempted to develop the factual basis for his claims in state court with the requisite diligence;" or (2) he satisfied the standards set forth in 28 U.S.C. § 2254(e)(2) by showing that a new constitutional rule applies to his claims for relief or that the factual predicate of such claims was previously undiscoverable through the exercise of due diligence. *See Keeling, supra*, No. 09-4284, slip op. at *20-21 (citing *Pinholster*, 131 S.Ct. at 1398 & 1400 n.4; *Couch v. Booker*, 632 F.3d 241, 245 (6th Cir. 2011)); *see also Robinson*, 663 F.3d at 823-24. No such showing has been made in this case.

IT IS THEREFORE RECOMMENDED THAT:

Petitioner's motion to amend the petition filed on June 27, 2011 (Doc. 17) and
petitioner's motion for evidentiary hearing (Doc. 22) be **DENIED**.

Date: 2/15/12
cbc

Karen L. Litkovitz
Karen L. Litkovitz
United States Magistrate Judge

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